

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**Y.J., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Oakland, CA, Employer**

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**Docket No. 15-298  
Issued: April 10, 2015**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 20, 2014 appellant filed a timely appeal from the October 24, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision. Since more than one year has elapsed from the last merit decision on October 7, 2008 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.<sup>2</sup>

**ISSUE**

The issue is whether appellant's July 21, 2014 reconsideration request was untimely filed and failed to establish clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. 20 C.F.R. § 501.3(d)(2).

## **FACTUAL HISTORY**

On July 12, 2005 appellant, then a 46-year-old modified clerk, filed a traumatic injury claim alleging that she injured her left hand and wrist in the performance of duty on June 21, 2005. She attributed the injury to using a hand grip machine during a functional capacity evaluation (FCE). Appellant claimed that the FCE left her with spasms and severe pain and no use of her left hand without numbness, throbbing, and stiffness. She stated that the hand grip and strength test caused her injury: “I had to do movement with my hands muscles, and lifting that I don’t normally do. ... My left hand was overused doing the FCE examination.”

OWCP denied appellant’s traumatic injury claim on March 1, 2006. On October 18, 2006 an OWCP hearing representative affirmed the denial. In decisions dated February 7, April 12, and July 10, 2007, OWCP reviewed the merits of appellant’s claim and denied modification of its prior decision.

Appellant requested reconsideration on November 23, 2007. OWCP reviewed the merits of her claim once more on February 22, 2008 and again denied modification of its prior decision. Appeal rights attached to that decision notified appellant that any reconsideration request must be made within one calendar year of the date of the decision.

Appellant appealed to the Board.<sup>3</sup> The Board reviewed the merits of appellant’s claim on October 7, 2008, and found that she did not meet her burden of proof to establish that she injured her left wrist during the June 21, 2005 FCE. The Board found that the evidence raised too many doubts whether the injury occurred as alleged, and the medical opinion evidence failed to establish in a convincing manner the critical element of causal relationship.

On November 4, 2008 appellant filed with the Board a timely petition for reconsideration. On June 17, 2009 the Board issued an order denying her petition, as it did not establish an error of fact or law in the Board’s October 7, 2008 decision warranting further consideration.

On July 8, 2009 appellant wrote to the Board. She submitted a copy of the FCE report. Appellant highlighted where the information was missing that would prove something happened to her left hand/wrist during the evaluation. She alleged a conspiracy between the postal inspectors and the employing establishment to deny her claim and fire her through fraudulent information in the FCE. Appellant alleged that the surveillance video was altered. She requested that the Board investigate her allegations so that the truth could come out. Appellant added: “Also to review the fraud in the Surveillance Video that W/C has on me.”

By letter dated July 23, 2009, the Clerk of the Board explained that the Board’s jurisdiction in appellant’s case ended once it issued its June 17, 2009 order denying her petition for reconsideration. The Clerk advised that decisions of the Board are final and not subject to review upon the expiration of 30 days from the filing of a decision, unless a petition for

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<sup>3</sup> Docket No. 08-1167 (issued October 7, 2008), *petition for recon. denied*, Docket No. 08-1167 (issued June 17, 2009). The facts of this case as set out in the Board’s prior decision are hereby incorporated by reference.

reconsideration is granted.<sup>4</sup> As the Board had denied her November 4, 2008 petition for reconsideration, the Board no longer had jurisdiction in the matter.

On December 10, 2009 appellant filed a reconsideration request with OWCP. In a decision dated May 27, 2010, OWCP denied her request. It reissued that decision on June 1, 2010. In a decision dated November 29, 2010, OWCP denied appellant's October 29, 2010 reconsideration request.

Appellant again appealed to the Board.<sup>5</sup> The Board issued a September 21, 2011 decision which found that OWCP properly denied her October 29, 2010 reconsideration request as it was untimely filed and failed to show clear evidence of error.

Appellant filed with the Board a timely petition for reconsideration dated September 25, 2011. On August 30, 2012 the Board issued an order denying her petition, as it did not establish an error of fact or law in the Board's September 21, 2011 decision warranting further consideration.

In a decision dated April 8, 2013, OWCP denied appellant's December 13, 2012 reconsideration request.

In the most recent appeal,<sup>6</sup> the Board found on November 13, 2013, that OWCP properly denied appellant's December 13, 2012 reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

Appellant filed with the Board a timely petition for reconsideration dated December 5, 2013. She also submitted letters dated December 11, 2013 and June 30, 2014. On June 18, 2014 the Board issued an order denying appellant's petition, as it did not establish an error of fact or law in the Board's November 13, 2013 decision warranting further consideration.<sup>7</sup>

On July 21, 2014 appellant filed a reconsideration request with OWCP. She argued that OWCP and the Board had failed to address the errors of facts and findings (fraud in video, timely filings, and error in reports from video). Appellant noted that she had been going from OWCP to the Board for the past nine years in a timely fashion. She noted that she submitted proof of a timely filing on July 8, 2009. Nothing was untimely, appellant argued. She alleged that she was being treated unfairly and being denied due process.

In a decision dated October 24, 2014, OWCP denied appellant's July 21, 2014 reconsideration request. It found that the request was untimely filed and failed to show clear

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<sup>4</sup> 20 C.F.R. § 501.6(c)-(d).

<sup>5</sup> Docket No. 11-685 (issued September 21, 2011), *petition for recon. denied*, Docket No. 11-685 (issued August 30, 2012).

<sup>6</sup> Docket No. 13-1478 (issued November 13, 2013).

<sup>7</sup> *Order Denying Petition for Recon.*, Docket No. 13-1478 (issued June 18, 2014).

evidence of error. OWCP noted that appellant's requests since October 7, 2008 have been untimely, and her arguments were repetitious and insufficient to warrant a reopening of her case.

Appellant argues on appeal that her July 8, 2009 letter to the Board was timely filed before the October 2009 deadline. She argues that she was denied due process and that the evidence was tainted and altered. Appellant alleges discrimination. She asserts that the challenge to her claim was falsified in the surveillance video, the report generated from the video was erroneous, and the findings were unlawful. Appellant states that she has filed timely since 2005.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”<sup>8</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provided that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.<sup>9</sup>

The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.<sup>10</sup>

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>11</sup>

The term “clear evidence of error” is intended to represent a difficult standard.<sup>12</sup> If clear evidence of error has not been presented, OWCP should deny the application by letter decision,

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<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (January 2004).

<sup>11</sup> 20 C.F.R. § 10.607(b).

<sup>12</sup> *Id.* at Chapter 2.1602.3.c (January 2004).

which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>13</sup>

### ANALYSIS

Appeal rights attached to OWCP's February 22, 2008 merit decision gave appellant one calendar year to request reconsideration from OWCP. A right to reconsideration within one year accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Therefore, when the Board conducted a merit review of appellant's case on October 7, 2008, appellant had one calendar year from the date of that decision, or until October 7, 2009, to file a reconsideration request with OWCP.<sup>14</sup>

Because the Board's October 7, 2008 decision remains the most recent merit decision in appellant's case, the deadline for filing a reconsideration request with OWCP expired on October 7, 2009. Only a subsequent merit decision by OWCP can renew the one-year period for requesting reconsideration, and no decision she has received since 2008 has reopened her case or reviewed the merits of her claim or listed reconsideration as one of her appeal rights.

As the Board explained in the prior appeal, every reconsideration request appellant has filed with OWCP since October 7, 2009 has been untimely. Appellant made her most recent reconsideration request on July 21, 2014. As the deadline for requesting reconsideration from OWCP was October 7, 2009, her request was more than four years late. Appellant disputes this by pointing to the July 8, 2009 letter she sent to the Board following its October 7, 2008 merit decision and June 17, 2009 order denying her November 4, 2008 petition for reconsideration. She thinks the July 8, 2009 letter to the Board was a reconsideration request sent to OWCP within one calendar year of the Board's October 7, 2008 merit decision and her confusion about this is causing her to believe that she has been unfairly treated and denied due process for many years.

Appellant's argument that she filed a timely reconsideration request on July 8, 2009 is fatally flawed. The July 8, 2009 letter to the Board is not a reconsideration request made to OWCP pursuant to section 8128(a) of FECA. Appellant did not send the letter to OWCP at the address shown on the appeal request form attached to its February 22, 2008 merit decision. OWCP regulations provide that an employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by OWCP in the final decision.<sup>15</sup>

Appellant sent a letter instead to the Board, and she addressed the Board directly. There is no ambiguity. Appellant did not ask OWCP to reopen her case or review the merits of her claim. She asked the Board to investigate her allegations so that the truth could come out, and she asked the Board to review the fraud in the surveillance video that OWCP had on her.

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<sup>13</sup> *Supra* note 10 at Chapter 2.1602.3.d(1).

<sup>14</sup> *Supra* note 10.

<sup>15</sup> 20 C.F.R. § 10.606(a).

The Clerk of the Board explained to appellant on July 23, 2009 that the Board no longer had jurisdiction in the case. The Board's October 7, 2008 merit decision became final and not subject to review upon the expiration of 30 days from the filing of the decision. Although the deadline for requesting reconsideration from OWCP was October 7, 2009, appellant would not request reconsideration until December 10, 2009. She had approximately two months following the Clerk's response to send OWCP a reconsideration request, but she missed the deadline and every reconsideration request she has made since that time has been untimely.

As appellant's July 21, 2014 reconsideration request was untimely, OWCP will not reopen her case without proof that its decision to deny her traumatic injury claim was clearly erroneous. Clear evidence of error is intended to represent a difficult standard. The proof must be incontrovertible. Appellant's request must convincingly show, on its face, that OWCP's decision was wrong.

Appellant's request did not show clear evidence of error. She requested reconsideration because OWCP and the Board had failed to address fraud in the surveillance video, timely filings, and error in the reports from the video. Appellant emphasized that she had submitted proof of timely filing on July 8, 2009. However, this does not demonstrate on its face that OWCP's decision to deny her traumatic injury claim was erroneous. Appellant's most recent reconsideration request offered nothing new or convincing.

Accordingly, the Board finds that appellant's July 21, 2014 reconsideration request was untimely and failed to show clear evidence of error. The Board will therefore affirm OWCP's October 24, 2014 decision denying that request.

On appeal, appellant argues that her July 8, 2009 letter to the Board was timely filed before October 2009, and she states that she has timely filed since 2005. However, as explained alone, her requests were untimely.

### **CONCLUSION**

The Board finds that appellant's July 21, 2014 reconsideration request was untimely filed and failed to show clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board